No. 93-1454

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1993

ARTHUR CALDERON, WARDEN
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Petitioner,

v.

KENNETH CLAIR,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners, Arthur Calderon, Warden, California State Prison at San Quentin, California, and Daniel E. Lungren, Attorney General of the State of California, hereby submit the following reply to the Brief In Opposition.

I.

THE ISSUES RAISED IN THE PETITION ARE NOT MOOT.

Respondent maintains that, because the stays of execution have expired and federal habeas counsel has been appointed, the issues raised in the petition are moot.

Respondent neglects the fact that, as of this date, no federal habeas corpus petition has been filed, nor is it expected that one will be filed prior to September, 1994. More importantly, as demonstrated in the petition, the local rule based procedure, which results in a pre-petition stay of execution, is easily capable of repetition and thus the questions presented have not lost their character as a present live controversy.

II.

THE QUESTIONS PRESENTED IN THIS CASE ARE NOT PRESENTLY BEFORE THE COURT IN *MCFARLAND*.

Respondent maintains the petition should be denied as the issues presented are effectively before this Court in *McFarland v. Collins*, No. 93-6497.

Respondent's assertion is essentially incorrect. This case presents two issues not present in *McFarland*. Most significant is the fact that, in this case, unlike *McFarland*, the pre-petition stay of execution is based on a local rule of court. As discussed in the petition, the existence, nature and application of the local rules implicated in this case

presents the question whether such rules conflict with the separation of powers doctrine.

Moreover, unlike *McFarland*, this case involves the question whether the district court may disregard the justiciable case or controversy requirement by permitting an attorney who had "no legal authority to act on [respondent's] behalf" to seek an extention of a stay of execution based on the rationale that it was "within the [District] Court's] discretion to disregard this defect. [Citation omitted]." *Clair v. Vazquez*, 827 F. Supp. 1465, 1466-1467 (S.D. Ca. 1993).

III.

THE ENTITLEMENT TO APPOINTED COUNSEL TO PRESENT A FEDERAL HABEAS CHALLENGE TO A STATE COURT JUDGMENT DOES NOT CONFER JURISDICTION TO GRANT A PRE-PETITION STAY OF EXECUTION

Respondent essentially maintains that the right to appointed counsel afforded by 21 U.S.C. § 848(q)(4)(B) confers jurisdiction in the district court to grant a pre-petition stay of execution.

The question presented essentially is one of statutory interpreptation. Reliance on the provisions of 21 U.S.C. § 848(q)(4)(B) is not particularly helpful as the very language of this statutory provisions indicates that it is intended to augment, not supplant the federal habeas corpus statute.

The simple fact remains there is no constitutional right to counsel in federal or state post-conviction

proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *see also McCleskey v. Zant*, 499 U.S. ___, 111 S. Ct. 1454, 113 L. Ed. 2d 517, 545 (1991); *Coleman v. Thompson*, 501 U.S. ___, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991); *and Murray v. Giarratano*, 492 U.S. 1, 10, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) [opinion of Rehnquist, C.J. observing that "the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in non-capital cases"]. To hold that it is necessary to give effect to the statutory right to counsel by permitting a stay of execution based solely on a request for counsel essentially creates a constitutional right to counsel. If Congress intended to require that legal assistance be provided for all death row inmates, it could have chosen to do so.[1/] It does not defy common sense to say that Congress intended a convicted criminal to use his own resources to seek a federal habeas review of his state conviction.

Permitting a pre-petition stay is a clear example of placing the cart before the horse. A convicted criminal is entitled to seek federal habeas corpus review of his state judgment of conviction. To obtain appointment of counsel and a stay of execution, he must at least present a petition which sets forth ultimate facts indicating he is in custody in violation of the federal Constitution or laws or treaties of the United States. *Estelle v. McQuire*, ___ U.S. ___, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). It does not render

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[1]. As Justice Ginsburg observed during oral argument in *McFarland*, "[I]t would be very easy for Congress to say, anyone who desires to file a habeas petition is entitled to a lawyer for that purpose." Trans. oral argument proceedings held on March 29, 1994.

section 848(q)(4)(B) a "dead letter" by requiring presentation of a minimally sufficient petition. Rather, such a requirement reflects a proper interpretation of the statutory requirement concerning appointment of counsel by reconciling the two statutes in an harmonious manner. Reasoning to the contrary is predicated on the faulty premise that federal habeas corpus review is indispensable to due process of law. It is not!

The State of California is entitled to exercise "its sovereign power to enforce the criminal law . . ." (*In re Blodgett*, 502 U.S. ___, 112 S. Ct. 674, 116 L. Ed. 2d 669, 674 (1992)); an interest which this Court found of great weight in *McCleskey*, when discussing the importance of finality in the context of federal habeas proceedings. *McCleskey*, 113 L. Ed. 2d at 544-546.

While it may be less convenient for the court to require the filing of a petition before appointing counsel and granting a stay, inconvience does not justify a strained statutory interpretation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 22, 1994

Respectfully submitted,

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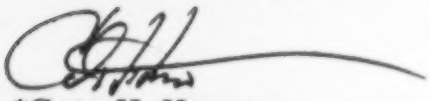

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